(1) No. 88-206

Supreme Court, U.S.
FILED
JUL 29 1988
JOSEPH F. SPANIOL, JR.
CLERK

In The Supreme Court of the United States
October Term, 1988

ROBERT L. TUCKER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JOHN A. POWELL
STEVEN R. SHAPIRO
American Civil Liberties Union Foundation
132 West 43rd Street
New York, New York 10036
(212) 944-9800

JAMES B. HADDAD
Northwestern University School of Law
357 East Chicago Avenue
Chicago, Illinois 60611
(312) 908-8325

Of Counsel

HARVEY GROSSMAN*
ALAN K. CHEN
The Roger Baldwin Foundation of ACLU, Inc.
20 East Jackson Boulevard
Suite 1600
Chicago, Illinois 60604
(312) 427-7330

Counsel for Petitioner
**Counsel of Record*

Pandick Technologies, Inc., Chicago • (312) 236-0200

QUESTIONS PRESENTED

1. Whether a defendant who demonstrates a prima facie case of intentional racial discrimination under Batson v. Kentucky is denied due process and equal protection of the law when, in the absence of a compelling governmental interest, the trial judge refuses to allow him an opportunity to hear and to respond to the government's purportedly race-neutral explanations for exercising peremptory jury challenges.

2. Whether it is a fundamental defect which inherently results in a complete miscarriage of justice for a trial court to refuse, in the absence of any government interest to the contrary,

to allow a defendant who demonstrates a prima facie case of intentional racial discrimination under Batson v. Kentucky an opportunity to hear and to respond to the government's purportedly race-neutral explanations for exercising peremptory jury challenges.

3. Whether "clearly erroneous" is the proper standard under Batson v. Kentucky for appellate review of findings regarding racial discrimination in juror selection when those findings result from an ex parte proceeding.

TABLE OF CONTENTS

Page

Questions Presented.....i

Table of Authorities.....iv

Opinions Below.....2

Jurisdiction.....2

Constitutional Provision Involved...3

Statement of the Case.....4

Reasons for Granting the Writ.....17

I. The decision below reflects a direct conflict among the federal courts of appeals as to whether a defendant who makes a prima facie case under Batson has a constitutional right, in the absence of a compelling government interest, to hear and to respond to the prosecution's reasons for the use of its peremptory challenges.....17

II. This case raises important and unresolved procedural issues in the wake of Batson which are likely to recur.....25

III. Application of a clearly erroneous standard of review to the trial court's factual findings regarding purposeful discrimination renders Batson a nullity where those findings are the result of an ex parte proceeding between the prosecutor and the judge.....37

Conclusion.....41

Appendix

A. Order of the United States Court of Appeals for the Seventh Circuit denying rehearing en banc (March 1, 1988).....A1

B. Decision of the United States Court of Appeals for the Seventh Circuit (January 6, 1988).....B1

C. Decision of the United States District Court for the Northern District of Illinois (February 27, 1987).....C1

TABLE OF AUTHORITIES

Cases — Page

Anderson v. City of Bessemer City, 470 U.S. 564 (1985).....38

Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977).....27

Batson v. Kentucky, 476 U.S. 79 (1986) .....passim

Floyd v. State, 511 So.2d 762 (Fla. App. 1987).....35

Gamble v. State, 357 S.E.2d 792 (Ga. 1987).....35

Griffith v. Kentucky, ___ U.S. ___, 107 S.Ct. 708 (1987).....5

Herring v. New York, 422 U.S. 853 (1975).....36

Kentucky v. Stincer, ____ U.S. ____, 107 S. Ct. 2658 (1987).....32

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).....26, 31

State v. Gilmore, 511 A.2d 1150 (N.J. 1986).....35

Strauder v. West Virginia, 100 U.S. 303 (1880).....25

Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981).....26, 27, 31

Tompkins v. Texas, cert. granted, No. 87-6405, ____ U.S. ____, 108 S. Ct. 1727 (1988) and 56 U.S.L.W. 3848 (U.S. June 13, 1988) (amending order granting cert.).....28, 38, 41

United States v. Davis, 809 F.2d 1194 (6th Cir.), cert. denied, ___ U.S. ___, 107 S.Ct. 3234-35 (1987).....21, 22, 23, 24

United States v. Garrison, No. 87-7649, slip op. (4th Cir. June 7, 1988).....20

United States v. Gordon, 829 F.2d 119 (D.C. Cir. 1987).....32

United States v. Thompson, 827 F.2d 1254 (9th Cir. 1987).....passim

United States v. United States Gypsum Co., 333 U.S. 364 (1948).....39

Williams v. Illinois, 466 U.S. 981 (1984) (order denying cert.).....36

Constitutional Provisions

U.S. Const. amend V.....passim

Statutes

18 U.S.C. §1014.....4

18 U.S.C. §1343.....4

28 U.S.C. §1254(1).....3

28 U.S.C. §2255.....2, 15, 16

Rules

Fed. R. Crim. P. 24.....6

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

ROBERT L. TUCKER, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Petitioner Robert L. Tucker respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered in the above-entitled proceeding on January 6, 1988.

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported at 836 F.2d 334, and is reproduced in the Appendix hereto.

The memorandum decision of the United States District Court for the Northern District of Illinois (Kocoras, D.J.) has not been reported. It is reproduced in the Appendix hereto.

JURISDICTION

Invoking federal jurisdiction under 28 U.S.C. §2255, Petitioner filed his motion to vacate and set aside his conviction and sentence in the Northern District of Illinois. On February 27, 1987, the district court denied Petitioner's motion. See p. C1, infra.

On Petitioner's appeal, the Seventh

Circuit entered a judgment and an opinion affirming the Northern District's order on January 6, 1988. See p. B1, infra. A petition for rehearing and rehearing en banc of petitioner's appeal was denied on March 1, 1988. See p. A1, infra.

On May 23, 1988, Justice Stevens ordered that the time for filing this petition for writ of certiorari be extended to and including July 29, 1988.

The jurisdiction of this Court to review the judgment of the Seventh Circuit is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury,

except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

1. Voir dire

On January 12, 1983, Petitioner Robert L. Tucker, a prominent black Chicago attorney, was convicted by an all-white jury of nine counts of wire fraud, 18 U.S.C. §1343, and one count of submitting false statements to a federally insured bank, 18 U.S.C. §1014. The jury was selected over Petitioner's objections when, after Petitioner

demonstrated a prima facie case of intentional racial discrimination under Batson v. Kentucky, 476 U.S. 79 (1986),[1] the judge suggested that the prosecutors proffer their purportedly race-neutral reasons for striking all the black venire members, but permitted them to do so in an ex parte, in camera conference.

Voir dire had been conducted by the trial judge, who asked a series of general questions. V.D. Tr. 1-88.[2] A

---

[1] Although Batson had not yet been decided at the time of trial, its retroactive applicability to Petitioner's case is undisputed. 836 F.2d at 338 (citing Griffith v. Kentucky, ___ U.S. ____, 107 S.Ct. 708, 716 (1987).

[2] Record cites are made as follows. References to the transcript of the voir dire conducted on December 6, 1982 are cited as "V.D. Tr. __", while references to the trial transcript are simply cited as "Tr. __." Other items in the record are referred to by the original record document number as "R.__."

total of 42 venirepersons were called and questioned, four of whom were black. After five persons were excused for cause, V.D. Tr. 30, 37, 41, 42, the prosecutors used four of their seven[3] peremptory challenges to strike all the black venirepersons. V.D. Tr. 73. It is undisputed that this demonstrated a prima facie case of intentional race discrimination under Batson. 836 F.2d at 338.

---

[3] Although seven peremptories were exercised by the government, clearly four of the six allotted for selection of regular jurors were used to exclude the black venire members. See Fed. R. Crim. P. 24(b). There is no evidence of record identifying which white venirepersons were excluded as regular jurors by the government's peremptories. Indeed, the government represented to the trial court in post-trial proceedings that it had no records or notes as to the identity of those two persons. R.209. The government's peremptory challenge in the selection of alternate jurors was Stacy Miller. V.D. Tr. 72.

In response to defense counsels' objection and the court's inquiry, the government affirmed that it had "tactical" reasons for its challenges, V.D. Tr. 74, and the judge suggested an in camera, ex parte submission. Id. All defense counsel objected to this ex parte proceeding. 836 F.2d at 337.

In the ex parte proceeding, the prosecution expressed its concerns. "This is a somewhat complicated international banking transaction case involving different banks, complicated documents, and a number of people with a daily chain of brokers, and a number of people with foreign names. We believe we need well-educated jurors, and that was the basis for most of our challenges." V.D. Tr. 79.

The prosecution then briefly

presented the judge with its reasons for excluding the four black members of the venire, Perry White, Emma Jackson, Elvira Edwards and David Bennett.

One of the prosecutors stated that White was not "particularly alert or interested," while another prosecutor pointed to White's employment as a bank messenger and security guard and observed that his education was "limited, I think, to high school." V.D. Tr. 79. The government also expressed its conclusion that White "did not seem to have the natural capabilities that we think are necessary." V.D. Tr. 79.

The extent of the prosecution's concern with Jackson was that she was single with three children at home and that she gave no employment history. V.D. Tr. 80.

The government speculated that Edwards might be "prejudiced" because she had a loan at Continental Bank, the target of the fraud underlying the prosecution. V.D. Tr. 79. They also stated, without elaboration, that Edwards was a widow. Id. Furthermore, the prosecution stated that Edwards was not "the type of juror we wanted" based on her educational background and her work experience. V.D. Tr. 79-80.

Finally, the government stated that Bennett had "a high school equivalent education, and was self employed as a scrap metal recycler," and concluded that he had "no experience in business that we could discern." V.D. Tr. 80.

After providing their ex parte explanations, the prosecutors stated that all seven of their peremptories had been

used to dismiss people who were not "educated beyond high school, and were people who were not sophisticated in terms of dealing with business." V.D. Tr. 80. "[W]e wanted people who were at least experienced in business." Id.

After hearing these explanations, but without the benefit of defense counsel's responses, the judge returned to open proceedings and stated for the record that he was satisfied with the prosecutors' explanations and that there was no evidence of systematic exclusion of the four blacks on the venire. V.D. Tr. 81, 82.

While in the ex parte hearing the prosecution stressed the complexity of the case, the government characterized the entire prosecution to the jury as being a "simple case." Tr. 11-12, 3290.

The government's explanations for exclusion are not consistent with the limited record that was created. Most importantly, some of the white jurors who were empanelled without objection by the prosecutors had equivalent education and business experience to the black venirepersons. This fact went unmentioned by either the prosecutors or the judge.

For example, Robert Barrett, sworn as the eleventh white juror, indicated that he had "high school" and was a truck driver for a security firm. V.D. Tr. 50. In comparison, Perry White, an excluded black, was a high school graduate with employment experience as a bank messenger and security guard. V.D. Tr. 21-22.

Paul Pasteris, the ninth white juror empanelled, had "a high school education"

and was the garden shop manager at a discount store. V.D. Tr. 35. By contrast, David Bennett, another black venireperson challenged by government peremptory, had a high school equivalency and had been in the scrap-metal recycling business for 25 years. V.D. Tr. 54-55.

In spite of its expressed concerns about the complexity of the case, the government did not request the court to ask additional questions to clarify the education and business experience of venire members, although not all of them provided detailed information about those matters. Jackson, for example, had a high school education of undetermined length and was not even asked during voir dire about any business experience. V.D. Tr. 34.

In the absence of defense counsel,

no record was made from which it could be determined that the white venirepersons who were ultimately empanelled were any more "alert or interested" than Perry White. Furthermore, no one probed the government as to what "natural capabilities" White was lacking.

After the ex parte meeting the judge stated for the record that the prosecutors had provided satisfactory explanations of their challenges to both the black and white members of the venire. V.D. Tr. 80-82. In fact, the only statement offered by the prosecutors applicable to the whites they challenged was the general assertion, "I think if an analysis was done of all seven of our challenges, even those persons were people who were not educated beyond high school, and were people who were not

sophisticated in terms of dealing in business." V.D. Tr. 80.

However, no record was made regarding the identity of the two white venirepersons objected to by the government during the selection of regular jurors. Thus, there is no record evidence of the education or business experience of those two white venire members. There is no corroboration for the government's representations that it had exercised its peremptories consistent with its concern that jurors be educated "beyond high school" and "at least experienced in business." V.D. Tr. 80.

2. Trial

The all-white jury was empanelled and the case tried. Petitioner was convicted on each count in the indictment. The trial judge denied all

of Petitioner's post trial motions which raised, inter alia, the denial of due process resulting from the ex parte proceeding on his jury discrimination claim. R. 174.

The Seventh Circuit affirmed the conviction on direct appeal, 773 F.2d 136 (7th Cir. 1985). This Court, with Justice Marshall dissenting, denied certiorari on July 7, 1986. 106 S.Ct. 3338-39 (1986). On September 3, 1986, a petition for rehearing was denied. 107 S.Ct. 23 (1986).

3. The §2255 Petition

Relying on this Court's Batson retroactivity decision in Griffith, see supra at p. 5, n.1, Petitioner filed a motion pursuant to 28 U.S.C. §2255 requesting the district court to vacate his conviction and sentence. R. 162.

The trial court, now acting with the benefit of Batson, denied Petitioner's motion, indicating that it was satisfied with the procedures it had undertaken and with the prosecution's explanations. R. 287 at 3.

4. Appeal of §2255 Petition

The Seventh Circuit affirmed the district court's order, 836 F.2d 334 (7th Cir. 1988), concluding that Batson neither requires nor forbids an adversarial hearing following a prima facie Batson showing. However, the reviewing court also found that there was no reason that in this case the prosecutors could not have disclosed in open court their reasons for excluding the four black venirepersons. 836 F.2d at 340. The Court also discussed and expressly rejected the Ninth Circuit's

directly contrary holding in United States v. Thompson, 827 F.2d 1254 (9th Cir. 1987). 836 F.2d at 340. The Seventh Circuit denied a petition for rehearing and rehearing en banc on March 1, 1988.

It is from this opinion and judgment that Petitioner now seeks a writ of certiorari to issue to the Seventh Circuit for review of its decision.

REASONS FOR GRANTING THE WRIT

I.

The decision below reflects a direct conflict among the federal courts of appeals as to whether a defendant who makes a prima facie case under Batson has a constitutional right, in the absence of a compelling government interest, to hear and to respond to the prosecution's reasons for the use of its peremptory challenges.

Four Courts of Appeals have now addressed the issue of whether, in the absence of a compelling justification, it is constitutionally permissible in implementing Batson for prosecutors to make an ex parte submission of their reasons for excluding black venirepersons and for trial courts to rule on the Batson challenge without divulging those reasons to the defendant. These courts have split evenly on the issue. The Fourth and Ninth Circuits have ruled that in such circumstances due process and Batson prohibit the abandonment of such basic adversarial procedures. The Sixth and Seventh Circuits have held to the contrary.

In United States v. Thompson, 827 F.2d 1254 (9th Cir. 1987), as in this case, the defendant, due to an ex parte

proceeding, was denied any knowledge of the reasons asserted by prosecutors for their allegedly race-based peremptory challenges. The court held that an adversarial hearing is constitutionally mandated in Batson proceedings unless there is compelling government justification to the contrary, such as where government disclosure of its motivations would divulge important trial strategy. 827 F.2d at 1258-1259.

Thompson held there was insufficient justification for proceeding ex parte because the prosecution's reasons were "mundane," involving a potential juror's occupation, appearance, attitude and place of residence. 827 F.2d at 1259. The Ninth Circuit ruled the trial court's procedures unconstitutional and remanded the case for a full hearing under Batson.

Id. at 1262.

The court also noted that the denial of defendant's participation had resulted in an incomplete or misleading record, 827 F.2d at 1261, and the court did not apply a clearly erroneous standard of review to the trial court finding regarding the prosecution's motivation. 827 F.2d at 1263. (Sneed, J., dissenting).

More recently, the issue was presented in United States v. Garrison, No. 87-7649, slip op. (4th Cir. June 7, 1988). In Garrison there was full disclosure of the reasons for the government's challenges and defendant was provided an opportunity for rebuttal. However the prosecution also submitted its notes, made during voir dire two years earlier, to the court for ex parte

inspection. Slip op. at 37.

While recognizing the contrary holding of the Sixth Circuit's decision in U.S. v. Davis, 809 F.2d 1194 (6th Cir.), cert. denied, ____ U.S.____, 107 S. Ct. 3234 (1987), the Court of Appeals for the Fourth Circuit expressly "agree[d] with the Ninth Circuit that the important rights guaranteed by Batson deserve the full protection of the adversarial process except where compelling reasons requiring secrecy are shown." Slip op. at 6. Because the prosecution's notes neither contradicted nor added anything to the government's reasons offered and argued in open court, the Fourth Circuit found no necessity to remand for a new Batson hearing. Id.

In contrast is U.S. v. Davis, relied upon by the Seventh Circuit in this case.

There, as here, the defendant was provided only half of a Batson hearing. The trial court refused to disclose to defendant the prosecution's reasons for its peremptories and failed to state any specific governmental interest which justified the ex parte procedure. 809 F.2d at 1200.

The Sixth Circuit approved the trial court's approach though it too did not identify any government interest which supported proceeding ex parte. 809 F.2d at 1202. The court held that there was no constitutional error, stating that the defendant's participation after making a prima facie Batson case was unnecessary, and that because this Court in Batson had expressly declined to formulate particular procedures, it had left it to trial courts to determine what role

defendants were given once the prosecution offered its reasons for juror exclusion. Id. at 1201-02.

Davis vests total discretion in the trial court in deciding whether defendants may hear and respond to the prosecution's reasons for its peremptories. Id. at 1202-03. The court reviewed the inherently incomplete record, and affirmed the trial court's finding of no discriminatory motivation. Id. at 1203.

In Petitioner's case, an ex parte proceeding was used to deny the defense any knowledge of the government's reasons for its peremptories and any opportunity to respond to them. The Seventh Circuit expressly found that the prosecutor could have disclosed its reasons for excluding all black venirepersons in open court.

836 F.2d at 340.

Nonetheless, the court rejected the Ninth Circuit's decision in Thompson and approved the reasoning of the Sixth Circuit in Davis. The Seventh Circuit, primarily relying on this Court's language in Batson stating that it declined to formulate particular procedures, held that Robert Tucker had no right to hear why the government struck all of the persons of his race from his jury and had no right to show that the government's reasons were pretextual. 836 F.2d at 340. Also, in apparent contradiction to Thompson, the Seventh Circuit reviewed the limited trial record and, applying a clearly erroneous standard, affirmed the district court's finding that there was no intentional discrimination. Id.

This sharp division in the circuits on this critical question concerning Batson's basic implementation justifies the grant of certiorari to review the Seventh Circuit's judgment in this case.

II.

This case raises important and unresolved procedural issues in the wake of Batson which are likely to recur.

This Court has for over 100 years proscribed intentional racial discrimination in the selection of juries. See Strauder v. West Virginia, 100 U.S. 303 (1880). Following a long line of cases finding racial discrimination in the selection of the venire and petit juries constitutionally unacceptable, this Court held in Batson v. Kentucky, 476 U.S. 79 (1986), that trial court inquiry into the government's

possible use of racially-selective peremptory jury challenges is vital to safeguarding equal protection rights.

Batson established a sound and well-reasoned evidentiary framework for resolution of claims of intentional discrimination by prosecutors who engage in racially-selective peremptory jury challenges. Guided by its earlier precedents regarding the burden of proof in discrimination cases, see, e.g., McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981), the Court held that where, as here, a defendant has shown a prima facie discrimination claim, the burden shifts to the government to come forward with race-neutral explanations for its peremptory challenges. 476 U.S. at 97.

This Court further relied in Batson upon these earlier discrimination cases to require that in making their showing, prosecutors are obligated to provide a "clear and reasonably specific" explanation of their "legitimate reasons" for exercising their challenges. Id. at 98 n.20 (citing Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 258 (1981)).

Again, drawing from earlier discrimination cases, Batson charges trial courts are charged with the duty of evaluating defendants' purposeful discrimination claims and undertaking "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available," 476 U.S. at 93 (citing Arlington Heights v. Metropolitan Housing Development Corp.,

429 U.S. 252, 266 (1977)), and "should consider all relevant circumstances." Id. at 96-97. "By requiring trial courts to be sensitive to the racially discriminatory use of peremptory challenges," this Court stated, the Batson decision "enforces the mandate of equal protection and furthers the ends of justice." Id. at 99.

Because Batson is really a case about evidentiary burdens, failure to further define the rudimentary framework within which those burdens must be assumed leaves the story unfinished.[4]

---

[4] This Court recently recognized this point in the context of appellate review in granting a writ of certiorari to the Texas Court of Criminal Appeals in Tompkins v. Texas, cert. granted, No. 87-6405, 108 S. Ct. 1727 (1988) and 56 U.S.L.W. 3848 (U.S. June 13, 1988) (whether appellate court applied proper standard under Batson in determining whether prosecution had satisfactorily

This case, in particular, is clearly of the type which Justice White stated would be "required to spell out the contours of the Court's Equal Protection holding" in Batson. 476 U.S. at 102 (White, J. concurring).

In Batson, this Court declined to formulate particular procedures to implement its decision. 476 U.S. at 99. It did so because of "the variety of jury selection practices" in the state and federal courts. 476 U.S. at 99 n.24. But that concern was no impediment to the Court stating the basic evidentiary burdens to be assumed by the respective

---

explained its use of peremptory challenges to exclude all blacks from jury, when court accepted facially dubious explanations from the prosecution while refusing to consider objective evidence in the record which demonstrates that such explanations are not plausible).

parties. Neither should it limit the willingness or ability of this Court to complete the assignment of the evidentiary roles by providing that the defendant, the party with the ultimate burden of persuasion, be afforded the opportunity to show that the government's reasons are pretextual.

Significantly, those very cases upon which Batson relied in initially defining the evidentiary roles of the parties are an appropriate source to look to in resolving the serious concerns raised by the ex parte hearings which are being conducted by lower courts in the aftermath of Batson. They provide, based upon common sense and basic demands of fairness, that the party with the burden of persuasion be afforded an opportunity to demonstrate that asserted defenses to

a prima facie case of discrimination are pretextual -- "a coverup for a racially discriminatory decision." See, e.g., McDonnell Douglas, 411 U.S. at 805.[5]

In fact, these cases recognize that requiring the allegedly discriminating party to come forward with legitimate reasons for its actions serves "to frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext," Burdine, 450 U.S. at 255-56.

It is difficult to imagine a greater handicap than denying a party who bears the ultimate burden of proof an opportunity to hear arguments or evidence

---

[5] Indeed, the McDonnell Douglas decision was cited by this Court in Batson as explaining the operation of prima facie burden of proof rules. 476 U.S. at 94 n.18.

in response to his or her prima facie case, to forbid that party to present additional evidence and to even deprive that party an opportunity to marshal the evidence in the form of responsive arguments.

This Court has recognized that the right of due process includes the defendant's right to be present "at any stage of a criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of its procedure." Kentucky v. Stincer, ___ U.S. ___, ___, 107 S.Ct. 2658, 2667 (1987). A defendant's presence at voir dire is a requirement of due process because such presence bears a reasonably substantial relationship to his or her opportunity to defend the charge. United States v. Gordon, 829 F.2d 119, 124 (D.C.

Cir. 1987).

Notwithstanding the historically recognized importance of adversary proceedings and the defendant's right to be present in this context, the Seventh Circuit in this case approved the ex parte proceedings despite its conclusion that the government had no reason at all for not disclosing its explanations for its peremptory challenges. 836 F.2d at 340.

But the interests reaffirmed in Batson are so important that this Court must make adversarial hearings the constitutional rule and limit the trial court's discretion regarding ex parte proceedings to specified and compelling circumstances. To countenance otherwise is to guarantee the anomalous result reached by the Seventh Circuit in this

case. Petitioner Tucker and his counsel were excluded from hearing the government's "justifications" and precluded from offering rebuttal, yet the Court found that there was no reason whatsoever for the ex parte communication. 836 F.2d at 340.

The promise of Batson was denied to the Petitioner and the excluded jurors with no discernable benefit to the government. Of equal importance is that permitting an ex parte proceeding involving prosecutors and the trial judge threatens to impair the public's perception of the integrity of the criminal justice system. See Batson, 476 U.S. at 87-88.

The importance of providing adversarial procedures in these circumstances is starkly illustrated in

Petitioner's case. Had Petitioner been provided such proceedings he could have participated in a manner which may have not only substantiated his assertions of racial discrimination, but also developed a record for a meaningful appellate review of the judge's decision.

Petitioner could have pointed out where the government's explanations might indicate bad faith or pretext by showing that white jurors similarly situated to the black veniremembers were allowed to serve on the jury.[6] As this Court has

---

[6] In several state courts, a showing that black venire members who were struck by the government's peremptory challenges shared characteristics with white venirepersons who were empanelled without government objection has been held to be a persuasive demonstration that the prosecutors' proffered neutral justifications are a mere pretext. See, e.g., Floyd v. State, 511 So.2d 762, 764-65 (Fla.App. 1987); State v. Gilmore, 511 A.2d 1150, 1168 (N.J. 1986); Gamble v.

observed, by arguing the inferences to be drawn from all the testimony and pointing out the weaknesses in their adversaries' positions, advocates help the factfinder by sharpening and clarifying the issues for resolution. Herring v. New York, 422 U.S. 853, 862 (1975).

Review of Petitioner's case by this Court will provide meaningful guidance to lower courts in a large number of cases. Only two years after Batson, the question has already reached four federal circuit courts.[7]

Accordingly, review of this case is

State, 357 S.E.2d 792, 796 (Ga. 1987).

[7] As Justice Marshall has stated, the problem of discriminatory use of peremptory challenges by prosecutors has been historically abundant in Illinois as well as other jurisdictions. Williams v. Illinois, 466 U.S. 981, 982 (1984) (Marshall, J. and Brennan, J. dissenting from denial of certiorari).

important to fully implement this court's decision in Batson.

III.

Application of a clearly erroneous standard of review to the trial court's factual findings regarding purposeful discrimination renders Batson a nullity where those findings are the result of an ex parte proceeding between the prosecutor and the judge.

Petitioner requests this Court to clarify the appellate role in reviewing the trial court's factual findings regarding racially-selective peremptory challenges in order to resolve an apparent conflict among the Circuit Courts of appeal.[8] In addition, this

---

[8] The Seventh Circuit expressly applied the clearly erroneous standard in Petitioner's case. 836 F.2d at 340. The Ninth Circuit in Thompson implicitly refused to do so. See Thompson, 827 F.2d at 1263 (Sneed, J., dissenting).

case, like Tompkins v. Texas, cert. granted, No. 87-6405, raises an important issue which is critical to insuring meaningful appellate review of juror discrimination findings and a full and proper implementation of Batson.

This Court noted in Batson that determinations of intentional discrimination are findings of fact entitled to appropriate deference, and that where those findings turn on an evaluation of credibility, a reviewing court must, ordinarily, give great deference to the trial judge. 476 U.S. at 98 n.21.

In so stating, the Court cited its decision in Anderson v. City of Bessemer City, 470 U.S. 564 (1985). Anderson reaffirmed the earlier articulation of the clearly erroneous standard in United

States v. United States Gypsum Co., 333 U.S. 364, 395 (1948), that "[a] finding is 'clearly erroneous' when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Emphasis added.)

In light of these precedents, the principles underlying the clearly erroneous standard are seriously undermined where a party is denied, in the first instance, the opportunity even to develop an adequate record. A reviewing court cannot be confident that the trial judge's fact findings are deserving of deference if it cannot be assured that it is measuring those findings against the "entire evidence."

In this case the trial judge denied

Petitioner the opportunity to hear what arguments he was charged with rebutting, to respond to those arguments, to develop additional facts and to marshal the evidence. Because of these basic procedural deprivations, the trial court's factual determinations themselves are inherently unreliable. See Thompson, 827 F.2d at 1261.

Deferring to such findings under the "clearly erroneous" standard in circumstances where an adequate record could not be developed only serves to compound the deficiencies inherent in an ex parte hearing. This cannot be condoned in view of the importance of fact-finding to insuring the promise of Batson.

CONCLUSION

For the reasons set forth in this petition, the Court should issue a writ of certiorari to review the judgment and decision of the Seventh Circuit in Petitioner's case or, in the alternative, hold this petition pending a decision in Tompkins v. Texas.

Respectfully submitted,

Harvey Grossman*
Alan K. Chen
The Roger Baldwin
Foundation
of ACLU, Inc.
20 East Jackson Boulevard
Suite 1600
Chicago, Illinois 60604
(312) 427-7330

Counsel for Petitioner

*Counsel of Record

Appendix A

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

March 1, 1988.

Before

Hon. William J. Bauer, Chief Judge
Hon. Walter J. Cummings, Circuit Judge
Hon. Richard A. Posner, Circuit Judge

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

No. 87-1324

ROBERT L. TUCKER,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

Charles P. Kocoras, Judge.

ORDER

On consideration of the petition for rehearing with suggestion for rehearing *en banc* filed in the above-entitled cause by Defendant-Appellant Robert L. Tucker, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny the petition for rehearing. Accordingly,

IT IS HEREBY ORDERED that the aforesaid petition for rehearing be, and the same is, DENIED.

Appendix B

In the

United States Court of Appeals

For the Seventh Circuit

Nos. 87-1049, 87-1050, and 87-1324

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ROBERT L. TUCKER and DEBORAH BELL,

Defendants-Appellants.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 82 CR 253—Charles P. Kocoras, *Judge*.

ARGUED SEPTEMBER 18, 1987—DECIDED JANUARY 6, 1988

Before BAUER, *Chief Judge*, CUMMINGS, and POSNER, *Circuit Judges*.

BAUER, *Chief Judge*. A jury convicted Deborah Bell, Robert Tucker, and Michael Ball on charges of wire fraud, 18 U.S.C. § 1343, and submitting false statements to a federally insured bank, 18 U.S.C. § 1014. All were sentenced to prison terms plus periods of probation and ordered to make restitution, subject to certain conditions. In an earlier opinion, we affirmed the convictions. *United States v. Tucker*, 773 F.2d 136 (7th Cir. 1985), *cert. denied*, ____ U.S. ____, 106 S. Ct. 3337 (*Bell*), and ____ U.S. ____, 106 S. Ct. 3338-39 (*Tucker*) (1986).

Shortly before they were to surrender to their designated institutions on September 9, 1986, Bell and Tucker

each filed motions pursuant to Federal Rule of Criminal Procedure 35 for a new trial based upon newly discovered evidence, and motions to stay their surrender dates. The newly discovered evidence is the putative testimony of Ball, the essentials of which are contained in an August 27, 1986 affidavit accompanying the motions for a new trial. In addition, on January 27, 1987, Tucker filed a motion pursuant to 28 U.S.C. § 2255 to vacate and set aside his judgment of conviction and sentence, alleging constitutional deprivations in the petit jury selection process. The district court denied Bell's and Tucker's motions and both now appeal.

I.

Bell, a commodities broker in Chicago, and Tucker, her lawyer, contracted to sell 6,000 tons of beans to Guatemala for $5 million. Ball, a Miami freight forwarder, helped set up the deal. To get the beans, Bell contacted Irving Pheterson, a Miami commodities broker with a Far Eastern bean supplier. The contract provided that Guatemala would pay for the beans through a letter of credit issued by a Guatemalan bank and confirmed by the Continental Illinois National Bank in Chicago. Pursuant to the letter of credit, the Continental Bank would pay Bell for the beans upon receipt of documents showing that the beans had been loaded in Hong Kong on board a ship bound for Guatemala. Bell would then reimburse Pheterson.

The defendants presented to the Continental Bank documents showing that the beans had been loaded and shipped, and the bank paid on the letter of credit. There was no boat, however, and there were no beans. The documents were forged. The question at trial: By whom? The defendants argued that Pheterson designed the fraud and testified against them to save his skin. The government charged that because the letter of credit was not transferable, the defendants could not use it as collateral for a loan and therefore turned to forgery to get money to buy the beans. The jury found the government's version of events more credible and convicted all three defendants.

II.

Bell and Tucker both argue that the district court erred in denying them a new trial based upon the putative testimony contained in Ball's affidavit. That affidavit, in a nutshell, states that Ball and Pheterson prepared the false documents the defendants presented to the Continental Bank, and that neither Ball nor Pheterson told the defendants the documents were false before the bank paid on the letter of credit. Bell and Tucker argue that Ball's affidavit destroys Pheterson's trial testimony and vindicates their own version of events—that they had no knowledge of Pheterson's and Ball's fraudulent scheme.

Initially, we note that

> [t]he party who claims that the trial court erred in denying his motion for a new trial is not likely to be successful. The appellate court properly defers to the view of the trial court and will affirm unless there has been error as a matter of law or a clear and manifest abuse of judicial discretion.

United States v. Davis, 604 F.2d 474, 483 (7th Cir. 1979) (citation omitted). This is because a motion for a new trial based upon newly discovered evidence that exists only because a convicted defendant comes forward with an affidavit in which he states that he is prepared to exculpate his codefendants is inherently suspect. *United States v. Simmons*, 714 F.2d 29, 31 (5th Cir. 1983). Such motions are not favored by the courts and are viewed with great caution. *United States v. Goodwin*, 770 F.2d 631, 639 (7th Cir. 1985) (citation omitted), *cert. denied*, 474 U.S. 1084 (1986).

To obtain a new trial based upon newly discovered evidence, a defendant must show that the evidence " '(1) came to his or her knowledge only after trial; (2) could not have been discovered sooner had the defendant exercised due diligence; (3) is material, and not merely impeaching or cumulative; and (4) would probably lead to an acquittal in the event of a trial.' " *United States v. Feldman*, 756 F.2d 556, 560 (7th Cir. 1985) (quoting *United States v. Cherek*, 734 F.2d 1248 (7th Cir. 1984)).

The district court held that the putative testimony of Ball failed to satisfy the third and fourth prongs of the *Feldman* standard. The court found that Ball could not testify to some of the matters asserted in his affidavit under the Federal Rules of Evidence, that other assertions contained in it are consistent with the government's evidence, and that substantial evidence contradicts much of what Ball asserts that is inconsistent with the government's evidence. The court thus held that "[Ball's] proffered testimony is not new as to subject matter, but is a different version of what the jury heard. As such, and given its source, the evidence is merely impeaching or cumulative and is not material." The district court also found Ball's affidavit incredible. The court noted that Ball had "sat on his hands for close to four years" before coming forward with the new information, and that Ball had managed to accumulate another federal conviction for forging false documents in a sugar-for-export scheme between his felony conviction in this case and the date of his affidavit. The court concluded that "[c]onsidering the evidence against Ball himself and the fact that the jury convicted him on all counts, it cannot be said his testimony would probably lead to an acquittal in the event of retrial."

After reviewing Ball's affidavit and considering the defendants' contentions, we find that the district court did not abuse its discretion by refusing to grant a new trial. A district court, when entertaining a motion for a new trial, may rely on knowledge gained while presiding over the trial, *United States v. Garrison*, 296 F.2d 461, 465 (7th Cir. 1961), *cert. denied*, 369 U.S. 804 (1962), and when newly discovered evidence is suspect, it may assume the role of factfinder, *United States v. Carlin*, 573 F. Supp. 44, 46 (N.D. Ga. 1983) *affirmed*, 734 F.2d 1480 (11th Cir. 1984). Moreover, although Pheterson's testimony was important to the government's case against Bell and, especially, Tucker, *see Tucker*, 773 F.2d at 139, the government did not ground its prosecution entirely on Pheterson's story. Other corroborating evidence contributed to the

defendants' convictions. In Bell's case, there was fingerprint and handwriting evidence, testimony from bean suppliers, and testimony from Tucker's secretary. In Tucker's case, *inter alia*, his secretary testified to his presence during the preparation of questionable documents and to statements made by him that are consistent with guilty knowledge. *Id.* This corroborating evidence, plus the district court's understandable skepticism toward Ball's putative testimony, convinces us that the court did not abuse its discretion in denying a new trial.

III.

Tucker, who is black, also contends on appeal that the district court erred in denying his section 2255 motion to vacate and set aside his judgment of conviction and sentence. He argues that the court's finding that the prosecution did not purposefully exclude black venirepersons from the jury because of their race was clearly erroneous. He also argues that the procedure adopted by the district court to scrutinize the prosecution's motives violated his constitutional rights.

A.

During jury selection, before any party exercised any peremptory challenges, Tucker noted that only four of the thirty-six venirepersons questioned in the jury box were black. Tucker requested that the court require the prosecution to state, in camera for the record, its reasons for excusing any of the four blacks. The court reserved decision on the request.

The prosecution then exercised four of its seven peremptory challenges to exclude all four blacks on the venire. Tucker thereafter renewed his request that the court require the prosecution to explain in camera why it excused the blacks. After the prosecution told the court that it had reasons other than race for exercising its peremptories, the court asked if it would state those reasons in camera, out of the presence of the defendants. All the

defendants objected to an ex parte procedure. The court, however, overruled the defendants' objections.

After checking with its superiors, the prosecution agreed to comply with the court's request. Thus, in camera and out of the presence of the defendants, the prosecution explained that because the case involved a complicated international banking transaction between numerous parties with many complicated documents, it wanted jurors with education and business experience. After considering the government's explanation, the court "concluded and was satisfied that racial bias was not responsible for the challenge of the black venirepersons" without revealing the prosecution's stated reasons for the peremptories to the defendants.

B.

The Constitution's equal protection clause forbids a prosecutor from purposefully exercising peremptory challenges to exclude potential jurors solely on account of their race. *Batson v. Kentucky*, ___ U.S. ___, 106 S. Ct. 1712, 1718-19 (1986). In *Batson*, the Supreme Court held that a defendant may establish a prima facie case of such purposeful discrimination solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial. *Id.* at 1722-23.[1] Once the defendant establishes a prima facie case of such purposeful exclusion, the

[1] To establish such a prima facie case, a defendant

> first must show that he is a member of a cognizable racial group, and that the prosecutor exercised peremptory challenges to remove from the venire members of his race. Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits "those to discriminate who are of a mind to discriminate." Finally, the defendant must show . . . circumstances that raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race.

Batson, 106 S. Ct. at 1723 (citations omitted).

burden shifts to the prosecutor to present a neutral explanation for challenging black jurors. *Id.*[2] The Court expressly declined, however, "to formulate particular procedures to be followed upon a defendant's timely objection to a prosecutor's challenge." *Id.* at 1724.

Batson thus enables a defendant to overcome the long-standing presumption announced in *Swain v. Alabama*, 380 U.S. 202 (1965), that "in any particular case . . . the prosecutor is using the state's challenges to obtain a fair and impartial jury." *Id.* at 222. Until the Court overruled that portion of *Swain* in *Batson*, a defendant seeking to raise an equal protection challenge had to show that a prosecutor systematically used, over some period of time, peremptory challenges to exclude blacks from juries. *See id.* at 227. Although *Swain* was still good law at the time of Tucker's trial, the Court in *Griffith v. Kentucky*, ___ U.S. ___, 107 S. Ct. 708, 716 (1987), held *Batson* retroactively applicable to all cases not yet final. We must, therefore, apply *Batson*'s holding to Tucker's claim.

C.

Tucker's most serious contention is that the district court's in camera, ex parte procedure violated his fifth amendment right to due process and his sixth amendment right to a fair and impartial jury. The parties do not dispute that Tucker made out a prima facie case of purposeful discrimination under *Batson*, and that the burden shifted to the government to articulate race-neutral reasons for its peremptory challenges. What is in dispute is whether *Batson* allows a court to hear the prosecution's reasons for excusing black venirepersons in camera and out of the

[2] The prosecutor may not rely on an assumption that the challenged jurors would be partial to the defendant because of their shared race; nor may the prosecutor merely deny any discriminatory motive or assert good faith. *Batson*, 106 S.Ct. at 1722-23. The prosecutor "must articulate a neutral explanation related to the particular case to be tried." *Id.*

presence of the defendants, and then rule on the *Batson* challenge without divulging those reasons to the defendants. Tucker argues that "a secret proceeding between the prosecutor and the court" is an irrational interpretation of *Batson*, and that nothing in *Batson* or its progeny suggests that a prosecutor can rebut a defendant's prima facie case through an ex parte conversation with the judge. The government responds that *Batson* does not require an adversarial hearing before a court can rule on a *Batson* challenge and points to the Sixth Circuit's recent decision in *United States v. Davis*, 809 F.2d 1194 (6th Cir.), *cert. denied*, ___ U.S. ___, 107 S. Ct. 3234 (1987), for support.

In *Davis*, during jury selection in a pre-*Batson* trial, black defendants objected when the prosecution exercised peremptory challenges to exclude seven of nine black venirepersons from the petit jury. After finding facts sufficient to establish what it determined was a prima facie case of racially motivated exclusion, the district court required the prosecution to state its reasons for the peremptories in camera and out of the presence of the defendants. *Id.* at 1200. The district court then found that the prosecution did not purposefully exclude the venirepersons on the basis of their race. *Id.* On appeal, the Sixth Circuit held that the in camera, ex parte procedure was constitutional because "the record of the proceedings . . . simply [did] not indicate a situation where the presence of the defendants and their counsel was required to ensure fundamental fairness." *Id.* at 1201. The Sixth Circuit noted that the trial court had predicted with remarkable accuracy the burdens of proof and persuasion later pronounced by the Supreme Court in *Batson*, and found that the trial court's procedure was consistent with that decision because

> *Batson* does not require rebuttal of the Government's explanation by defense counsel. Nor does *Batson* require the participation of defense counsel while the Government's explanations are being proferred. This is not to say that rebuttal and participation by a defendant in the "neutral explanation" phase of a *Batson* challenge are always inappropriate. To the con-

> trary, the Supreme Court left it up to the trial court to determine what role defendants were to play once the government proffered its reasons for black juror exclusion.

Id. at 1202. In short, "the district court was entitled to hear from the government under whatever circumstances the court felt appropriate." *Id.*

The Ninth Circuit disagrees. A divided panel of that court held recently that the Constitution requires adversarial hearings when defendants raise *Batson*-type challenges. *United States v. Thompson*, 827 F.2d 1254 (9th Cir. 1987). In *Thompson*, the prosecution, during a pre-*Batson* trial, used peremptory challenges to exclude all four black venirepersons from the petit jury. After the defendant moved for a mistrial, the district court heard the prosecution's reasons for the disputed challenges in camera and out of the presence of the defendant, who argued that such a procedure violated his fifth and sixth amendment rights.

The Ninth Circuit, in its comprehensive treatment of the issue, first noted that

> situations where the court acts with the benefit of only one side's presentation are uneasy compromises with some overriding necessity, such as the need to act quickly or to keep sensitive information from the opposing party. Absent such compelling justification, ex parte proceedings are anathema in our system of justice and, in the context of a criminal trial, may amount to denial of due process.

Id. at 1258-59. The court then considered three "separate, but related" justifications for the ex parte procedure asserted by the government: (1) that once a defendant has identified a potential *Batson* violation, its participation is no longer necessary for the district court to make its determination; (2) that adversarial hearings potentially involving the questioning of government counsel would be too burdensome and disruptive; and (3) that the potential for release of confidential information could prejudice

the government's ability to prosecute its case. *Id.* at 1259-61.

The Ninth Circuit found the first justification the least persuasive. According to the court, the defendant can point out to the judge when the government's stated reason may indicate bad faith, and may be able to argue that the government's reasons are legally improper. Thus, the notion that a defendant has nothing to add once he or she has identified a potential *Batson* violation "did not square with reality." *Id.* at 1260.[3] The court also rejected the second justification, stating that it "would be surprised . . . if [adversarial] proceedings [would] involve anything more elaborate than the prosecutor's articulation of his reasons, followed by the argument of defense counsel pointing out why the articulated reasons are factually unfounded or legally insufficient." *Id.* at 1259-1260. The government's third justification, however, had some merit. "It is certainly possible," the court admitted, "that in a particular case the prosecution's motive for excluding potential jurors will grow out of its case strategy, and divulging those reasons to opposing counsel could cause it severe prejudice." *Id.* at 1259. But the court also dis-

[3] The Ninth Circuit believed that this justification "carried the day" with the Sixth Circuit in *Davis*. *Thompson*, 827 F.2d at 1260. We think this misreads the *Davis* opinion. The Sixth Circuit in that case found that the record of the proceedings *in the case before it* did not indicate a situation where the presence of the defendant was required to ensure fundamental fairness. See *Davis*, 809 F.2d at 1201. In addition, the Sixth Circuit amplified that it was referring only to the case before it when it explained its view of the proceeding below. It noted that the defendants had been able to argue the constitutional issue when it made each of three objections to the government's peremptory challenges during the jury selection process, and that the district court gave the defendants' claim painstaking attention by constructing a procedure for determining whether there was a racial motivation for the government's actions. *Id.* Moreover, the Sixth Circuit made clear that it was not holding that rebuttal by defendants in the explanation phase of a *Batson* challenge is always inappropriate. *Id.* at 1202.

carded this justification, reasoning that "when a prosecutor claims that his reasons relate to case strategy, the district judge can consider those reasons on an ex parte basis, at least initially, much as in situations involving *Brady* materials or the identity of informants." *Id.*

We disagree with the Ninth Circuit's holding that *Batson* requires adversarial hearings once a defendant establishes a prima facie case of purposeful discrimination. As already noted, the Supreme Court in *Batson* expressly declined to formulate procedures for district courts to follow upon a defendant's objection to a prosecutor's challenges. *Batson*, 106 S. Ct. at 1724. The Court apparently did so because trial judges deserve and normally enjoy a wide range of discretion in the administration of trials.[4] Indeed, the Ninth Circuit in *Thompson* stressed the central importance of trial court discretion in our criminal justice system. *See Thompson*, 827 F.2d at 1257-58. And that court's allowance for in camera, ex parte hearings when the prosecution claims that it exercised peremptory challenges pursuant to its case strategy gives the trial court discretion to determine whether an adversarial hearing is required in many, if not most cases. Stated bluntly, the *Thompson* exception swallows the *Thompson* rule. As Chief Judge Sneed's dissent pointed out, the majority in *Thompson* resorted to trial court discretion "to rescue it from the most troublesome aspect of its opinion." *Id.* at 1262 (Sneed, C.J., dissenting).

We thus agree with the Sixth Circuit that *Batson* neither requires rebuttal of the government's reasons by the defense, nor does it forbid a district court to hold an adversarial hearing. In this case, then, the district court's procedure passed constitutional muster. Indeed, we think the district court handled Tucker's challenge remarkably

[4] In the *Batson* Court's view, there was no reason to assume that trial judges would not identify prima facie cases of purposeful discrimination and perform conscientiously their duties under the Constitution. See *Batson*, 106 S. Ct. at 1724 n.32.

well. Like the district court in *Davis*, the court below accurately anticipated the burdens of proof and persuasion set forth in *Batson*, and its procedure certainly was countenanced by that decision.

Despite this conclusion, we believe that adversarial hearings are the appropriate method for handling most *Batson*-type disputes. In this case, for example, we believe that the prosecution could have explained its reasons for excluding the four black venirepersons in open court. Thus, while we hold that it is up to the trial judge to decide what procedure is best-suited for a particular case, we trust that the trial judge will utilize an adversarial procedure whenever possible.

D.

We have already considered and decided Tucker's final assertion—that the district court erred in finding that the prosecution did not purposefully exclude blacks from the jury because of their race. In the direct appeal of the defendants' convictions, we found that the judge had "satisfied himself that racial bias had not been responsible for the exclusion of the blacks. His determination, although challenged by the defendants, was not clearly erroneous, and therefore binds us." 773 F.2d at 142. It binds us still.

The district court is therefore

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

USCA 79004—Midwest Law Printing Co., Inc., Chicago—1-6-88—475

Appendix C

United States District Court
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

ROBERT L. TUCKER,

Defendant.

No. 82 CR 253

No. 87 C 614

MEMORANDUM OPINION

CHARLES P. KOCORAS, District Judge:

On April 7, 1982, Deborah Bell, Robert L. Tucker and Michael Ball were charged in a ten count indictment with violations of the wire fraud statute and with presenting false documents to a federally insured bank. In substance, the indictment charged the defendants with having engaged in a scheme to obtain over $5 million from Continental Illinois National Bank & Trust Company of Chicago by presenting false and fraudulent commercial documents to Continental in order to obtain payment on a letter of credit. All of the defendants were convicted of all counts in a jury trial, and the convictions were affirmed. 773 F.2d 136 (7th Cir. 1985).

On September 3, 1986, Deborah Bell and Robert Tucker filed motions for a new trial based upon newly discovered evidence. That evidence was the putative testimony of codefendant Michael Ball. The motions for a new trial were denied by this Court by opinion and order dated December 31, 1986.

Defendant Robert L. Tucker now moves, pursuant to 28 U.S.C. §2255, to set aside the judgment of conviction and sentence on the basis of the prosecutors' exercise of their peremptory challenges of four black venirepersons during jury selection. This case was tried and the appeal

decided prior to the United States Supreme Court's decisions in *Batson v. Kentucky*, 106 S. Ct. 1712 (1986), and *Griffith v. Kentucky*, 85-5221 (decided January 13, 1987). *Batson* establishes that the issue of purposeful discrimination can be raised in the prosecutor's use of peremptory challenges even in the absence of allegations that the prosecutor has pursued a policy of purposeful discrimination based on race. In *Griffith*, the Supreme Court decided that the ruling in *Batson* was applicable to litigation pending on direct state or federal review or not yet final when *Batson* was decided.

It is worthy of note that this joint trial involved one black, the defendant Tucker, and two whites, the defendants Bell and Ball. It is also worthy of note that there was no assertion, either pretrial or during jury selection, that the U.S. Attorney's office engaged in a practice in which blacks were systematically excluded from juries in this district. Prior to the exercise of any peremptory challenges, counsel for Tucker asked to have the prosecution "submit to your Honor in camera for the record – for instance, on appeal – as to the reasons why they excused those jurors, other than of course, race."

After the prosecutors exercised their peremptory challenges, including those raised in the instant motion, this Court, although not then required to do so, did in fact require the prosecutors to explain the basis of the four challenges to the black venirepersons. That explanation indicated that all of the prosecutors' challenges were based on the fact that this case involved international banking transactions, different banks, complicated documents, and other related matters. It was also expressly asserted that race was not a factor. This Court concluded and was satisfied that racial bias was not responsible for the challenge of the black venirepersons.

The case of *Batson* did not introduce a principle that this Court was insensitive to prior to its articulation.

Three and one-half years before the Supreme Court spoke on the issue of race and its impropriety in the exercise of peremptory challenges, this Court determined that it was not a device used to deprive the defendant Tucker and his codefendants Bell and Ball of their Constitutional rights in the composition of the jury of their peers. The *Batson* court "decline(d) . . . to formulate particular procedures to be followed," and this Court is satisfied that the procedure employed here was appropriate under the circumstances.

For the above reasons, the defendant's motion to vacate his conviction and sentence is denied.

/s/ CHARLES P. KOCORAS
United States District Judge

Dated: February 27, 1987

Supreme Court, U.S.
FILED
OCT 3 1988
JOSEPH E. SPANIOL, JR.
CLERK

(2)

No. 88-206

In the Supreme Court of the United States

OCTOBER TERM, 1988

ROBERT L. TUCKER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General

EDWARD S.G. DENNIS, JR.
Acting Assistant Attorney General

GEOFFREY BRIGHAM
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether under *Batson* v. *Kentucky*, 476 U.S. 79 (1986), a district court may hear ex parte a prosecutor's explanation for striking black veniremen from a jury panel.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	1
Argument	5
Conclusion	11

TABLE OF AUTHORITIES

Cases:

Allen v. *Hardy*, 478 U.S. 255 (1986)	4-5
Batson v. *Kentucky*, 476 U.S. 79 (1986)	4, 5-6
Griffith v. *Kentucky*, 479 U.S. 314 (1987)	4
Tompkins v. *Texas*, cert. granted, No. 86-6405, (May 16, 1988)	11
United States v. *Davis*, 809 F.2d 1194 (6th Cir. 1987), cert. denied, No. 86-6500 (June 22, 1987)	5, 8
United States v. *Garrison*, 849 F.2d 103 (4th Cir. 1988)	9, 10
United States v. *Thompson*, 827 F.2d 1254 (9th Cir. 1987)	5, 8

Constitution and statutes:

U.S. Const. Amend. XIV (Equal Protection Clause)	4
18 U.S.C. 1343	2
18 U.S.C. 1014	2
28 U.S.C. 2255	2, 4, 7, 9, 10

In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-206

ROBERT L. TUCKER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. B1-B12) is reported at 836 F.2d 334.

JURISDICTION

The judgment of the court of appeals was entered on January 6, 1988. A petition for rehearing was denied on March 1, 1988. On May 23, 1988, Justice Stevens extended the time for filing a petition for a writ of certiorari until July 29, 1988, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was con-

victed on nine counts of wire fraud, in violation of 18 U.S.C. 1343, and one count of presenting false statements to a federally insured bank, in violation of 18 U.S.C. 1014. He was sentenced to concurrent terms of 15 months' imprisonment on the first five counts, to be followed by five years' probation on the remaining five. He was also directed to make restitution of $5 million, subject to certain conditions. The court of appeals affirmed (773 F.2d 136 (1985)), and this Court denied certiorari (478 U.S. 1022 (1986)). On January 27, 1987, petitioner filed a motion pursuant to 28 U.S.C. 2255 to vacate and set aside his judgment of conviction and sentence. The district court denied the motion (Pet. App. C1-C3), and the court of appeals affirmed (Pet. App. B1-B12).

1. The evidence at trial is briefly summarized in the court of appeals' opinion (Pet. App. B2). It showed that co-defendant Deborah Bell, a commodities broker, was the intermediary for a fraudulent sale of 6,000 tons of black beans from a supplier in Hong Kong to a Guatemalan government agency. Petitioner, who was Bell's attorney, and co-defendant Michael Ball, a Miami freight forwarder, participated in the charged fraud. Pursuant to a sales contract, the buyer arranged for a $5 million letter of credit to be paid to Bell upon her submission of documents showing that the beans had been loaded on a vessel in Hong Kong. Bell submitted the required documents and obtained the funds. However, she and petitioner had forged the documents, and no beans were in fact shipped to Guatemala.

2. Petitioner is black. His co-defendants, Bell and Ball, are both white (Pet. App. C2). During jury selection, petitioner noted that only four of the 36 veniremen questioned in the jury box were black. Petitioner requested that the court require the prosecution to state for the

record its reasons for excusing any of the four blacks. The court reserved decision on the request. Pet. App. B5.

The government then exercised its seven peremptory challenges and struck the four black veniremen on the jury panel. Petitioner objected, asserting that the challenges were impermissibly used to exclude black persons. Petitioner renewed his request that the court require the prosecution to explain why it excused the blacks. After the prosecution told the court that it had reasons other than race for exercising its peremptory challenges, the court asked if it would state those reasons outside the presence of petitioner and his counsel. Petitioner objected to conducting the procedure ex parte. The court, however, overruled petitioner's objection. Pet. App. B5-B6.

The prosecutor explained to the district judge in an ex parte proceeding that he struck the veniremen on the basis of their education rather than their race. Because of the complicated nature of the charged fraud, the government believed that it needed well-educated jurors with business experience (Tr. 79-80). Of the four black jurors struck, only one had graduated from high school. In the prosecutor's opinion, that juror "did not appear to be particularly alert or interested" and "did not seem to have the natural capabilities that * * * are necessary" (*id.* at 79). Another struck juror had an eighth grade education and worked making brushes (*id.* at 34, 79-80); a third had attended high school but had no employment history (*id.* at 34); and a fourth apparently had some high-school level education and was self-employed in a job involving scrap metal recycling (*id.* at 54-55, 80). The prosecutor also noted that his three remaining challenges were similarly exercised to strike jurors who possessed only a high school education and lacked the business sophistication that the government deemed desirable in this case (*id.* at 80).

After considering the prosecutor's explanation, the district court concluded that race was not the criterion by which the peremptory challenges were exercised and that the government had an independent "strategic purpose" for its challenges (Tr. 81-82). The court of appeals accepted the district court's findings and affirmed on direct appeal (773 F.2d at 142). Petitioner then filed a petition for a writ of certiorari with this Court. That petition was pending when the Court held in *Batson* v. *Kentucky*, 476 U.S. 79, 96-99 (1986), that the Equal Protection Clause forbids a prosecutor from purposely exercising peremptory challenges to exclude potential jurors solely on account of their race. Following its decision in *Batson*, the Court denied certiorari in this case.

3. Petitioner subsequently filed a motion pursuant to 28 U.S.C. 2255 asking the district court to vacate his conviction and sentence. Petitioner claimed that his right to equal protection was violated by the prosecutor's exercise of peremptory challenges to exclude black veniremen and that the district court violated his right to due process by permitting the prosecutor to explain in an ex parte proceeding the reasons for his peremptory challenges. The district court denied petitioner relief, reasserting its initial conclusion "that racial bias was not responsible for the challenge of the black venirepersons" and finding that the ex parte questioning of the prosecutor was consistent with the procedures set forth in *Batson*. Pet. App. C2-C3.

The court of appeals affirmed. The court first concluded that *Batson* applied retroactively to this case.[1] The

---

[1] In *Griffith* v. *Kentucky*, 479 U.S. 314 (1987), the Court held that *Batson* was retroactively applicable to cases pending on direct appeal at the time that case was decided. The conviction in this case was not final, because *Batson* was decided on April 30, 1986, and the petition for a writ of certiorari from petitioner's direct appeal was not denied until July 7, 1986 (*Tucker* v. *United States*, 478 U.S. 1022). See *Allen* v.

court then held that the district court's handling of the *Batson* issue passed constitutional muster, noting that the district court "accurately anticipated the burdens of proof and persuasion set forth in *Batson*, and its procedure certainly was countenanced by that decision" (Pet. App. B12). The court of appeals noted that the Ninth Circuit in *United States* v. *Thompson*, 827 F.2d 1254 (1987), held that *Batson* requires "adversarial hearings once a defendant establishes a prima facie case of purposeful discrimination" unless the challenges would reveal government trial strategy (Pet. App. B11). But the court explained that the Ninth Circuit's "allowance for in camera, ex parte hearings when the prosecution claims that it exercised peremptory challenges pursuant to its case strategy gives the trial court discretion to determine whether an adversarial hearing is required in many, if not most cases" (*ibid.*). Thus, although the court of appeals cautioned district courts to "utilize an adversarial procedure whenever possible," the court agreed with the Sixth Circuit's decision in *United States* v. *Davis*, 809 F.2d 1194 (1987), cert. denied, No. 86-6500 (June 22, 1987), that "it is up to the trial judge to decide what procedure is best-suited for a particular case" (Pet. App. B12).

ARGUMENT

In *Batson*, this Court expressly "decline[d] * * * to formulate particular procedures to be followed upon a defendant's timely objection to a prosecutor's challenges" (476

Hardy, 478 U.S. 255, 258 & n.1 (1986) (*Batson* "should not be applied retroactively on collateral review of convictions that became final before our opinion was announced;" "final" means cases in which "the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for certiorari had elapsed before" the *Batson* decision).

U.S. at 99). Once a defendant has made a prima facie showing of discrimination, the government must provide an explanation for its peremptory challenges, but there is nothing in the language or the reasoning of *Batson* to suggest that the government's explanation must be made in public or disclosed to the defense. Indeed, the Court made clear in *Batson* that it did not intend to require any particular set of procedures for handling claims of discriminatory use of peremptory challenges (476 U.S. at 99-100 n.24). An explanation of the reasons for the government's peremptory challenges might disclose the government's trial strategy or aspects of its case that the prosecutor believed to be vulnerable. Nothing in *Batson* requires that the government place itself at such a disadvantage. The district court must satisfy itself that the prosecutor was not acting with a discriminatory motive, and the record on which the court bases that finding must be available for review. But where the district court is able to make a finding, on the basis of an explanation in the record, that the prosecutor was acting for non-discriminatory reasons, it is not essential to the fairness of the proceeding or the accuracy of that determination that the prosecutor's explanation be disclosed to the defendant or his attorney in every case.

Neither the district court nor the court of appeals suggested that the prosecutor's statement of reasons should be made outside the presence of the defense in all cases. The court of appeals suggested only that the district court retains the discretion, in appropriate cases, to review the prosecutor's explanation in a non-adversarial setting. If the prosecutor's explanation were questionable, or if it appeared that the defendant's participation in a particular case would be necessary to a fair determination of whether the prosecutor was in fact engaged in discriminatory conduct, the district court would retain the discretion to re-

quire that the prosecutor's explanation be revealed to the defendant and that the defendant be given an opportunity to comment upon or challenge the prosecutor's explanation. In this case, where the record of the in camera hearing left both the district court and the court of appeals with no doubt that the prosecutor's motives were proper, the district court did not abuse its discretion by declining to reveal the details of the in camera proceeding to the defense.[2]

No court of appeals has accepted petitioner's proposed per se rule requiring an adversarial hearing on every *Batson* motion. Rather, the courts of appeals have consistently held that trial courts must be accorded discretion in devising procedures to be used in litigating *Batson* claims. Although the court of appeals affirmed the use of in camera proceedings in this case, the court was careful to point out that "while * * * it is up to the trial judge to

---

[2] Petitioner contends (Pet. 35) that defense counsel could have "pointed out where the government's explanations might indicate bad faith or pretext by showing that white jurors similarly situated to the black veniremembers were allowed to serve on the jury." Petitioner, however, had ample opportunity to argue bad faith or pretext both on direct appeal and in his Section 2255 motion. Those arguments were simply unconvincing on the facts of this case and were rightly found to be so by both lower courts. The overall profile of the jurors selected validates the government's explanation that it sought a jury comprised of well-educated persons with significant experience in work or business. Of the jurors and alternates accepted by the government, four had college or post-graduate degrees; five had attended or were presently attending college; four had completed high school and had substantial or responsible employment. Only one alternate juror had less than a high school education. She had completed three and one half years of high school, but her lack of a high school diploma was compensated for by her secretarial skills and work experience. See Answer of the United States to Petition for Rehearing with Suggestion of Rehearing en Banc 4-5.

decide what procedure is best-suited for a particular case, [the court] trust[s] that the trial judge will utilize an adversarial procedure whenever possible" (Pet. App. B12). The court of appeals thus recognized that the circumstances of other cases may require more extensive procedures such as adversarial hearings.

In *United States* v. *Davis,* 809 F.2d at 1201, after examining the surrounding circumstances of the inquiry, the Sixth Circuit held that an ex parte proceeding satisfactorily protected the interests of the defendant under *Batson.* However, the Sixth Circuit recognized that "[t]his is not to say that rebuttal and participation by a defendant in the 'neutral explanation' phase of a *Batson* challenge are always inappropriate" since "the Supreme Court left it up to the trial court to determine what role defendants were to play once the Government proffered its reasons for black juror exclusion" (*id.* at 1202 (footnote omitted)).

In *United States* v. *Thompson,* 827 F.2d at 1258-1259, the Ninth Circuit noted that "ex parte proceedings are anathema in our system of justice and, in the context of a criminal trial, may amount to a denial of due process." Like the court of appeals in this case, however, the *Thompson* court recognized (*id.* at 1257) that "the district judge has broad discretion to fashion and guide the procedures to be followed in cases before him." Indeed, the Ninth Circuit noted that an adversarial hearing would be inappropriate in some cases, such as when the prosecutor's explanation of the reasons for his peremptory challenges would reveal trial strategy. For that reason, although the Ninth Circuit disapproved of conducting *Batson* hearings ex parte as a general rule, it did not adopt a per se rule against such a procedure.

Similarly, the Fourth Circuit in *United States* v. *Garrison,* 849 F.2d 103, 106 (1988), recognized that the need for an adversarial hearing depends on the circumstances of the case, noting that an ex parte hearing was sufficient "where compelling reasons requiring secrecy are shown." The Fourth Circuit cited with approval the court of appeals' decision in this case and agreed that " 'it is up to the trial judge to decide what procedure is best-suited for a particular case' " (*id.* at 107 (quoting Pet. App. B12)). Thus, although there are some differences in emphasis among the courts of appeals that have addressed the issue, the courts are unanimous in rejecting the per se rule advocated by petitioner.[3]

In any event, it is clear that petitioner has now received, in the course of the resolution of his Section 2255 motion, an "adversarial hearing" of the sort contemplated by both the Fourth and the Ninth Circuits. Neither of those courts suggested that the hearing must involve testimony by the prosecutor or be conducted at the time the jury is selected. Thus, the Ninth Circuit in *Thompson* merely remanded to the district court for a post-conviction hearing at which the defendant was to be given an opportunity to respond to the reasons given by the prosecutor for the exercise of his peremptory challenges and argue to the district court that those reasons "may indicate bad faith" or "were legally improper." *Thompson,* 827 F.2d at 1260.[4] See also

[3] Furthermore, all of these court of appeals decisions arose from trials that took place before this Court decided *Batson.* For that reason, and because the court of appeals in this case, the Fourth Circuit, and the Ninth Circuit have held that the trial judge should "utilize an adversarial procedure whenever possible" (Pet. App. B12), we do not expect that the use of ex parte proceedings after *Batson* will be widespread. Review of this issue would therefore be premature at this time.

[4] Although the court noted (827 F.2d at 1259-1260) that "[t]he scope of the proceeding, its duration, and the depth of inquiry are matters

Garrison, 849 F.2d at 105 (approving similar post-conviction procedures on *Batson* issue in the context of a motion for a new trial). Respondent has received precisely this sort of adversarial hearing on his *Batson* claim. See n.2, *supra*. He had a transcript of "the prosecutor's articulation of his reasons" and a full opportunity to argue to the district court in his Section 2255 motion "why the articulated reasons [we]re factually unfounded or legally insufficient" (827 F.2d at 1260). No court of appeals has held that a defendant is entitled to more than that or that the "adversarial hearing" must occur prior to trial. Indeed, it is unclear what petitioner is requesting in addition to the procedures he has already received or what, if anything, he could add to the arguments on the merits of his *Batson* claim that the courts below have already considered and rejected.

Petitioner also makes a somewhat obscure challenge (Pet. 37-40) to the clearly erroneous standard applied by the court of appeals in reviewing the conclusion of the district court that the government provided a satisfactory explanation for its exercise of peremptory challenges. Petitioner apparently does not dispute (Pet. 38-39) that such factual findings should ordinarily be reviewed under a clearly erroneous standard. Petitioner contends (Pet. 39-40), however, that, because of the lack of an adversarial proceeding, he was denied "the opportunity even to develop an adequate record" on which such review could be based. Petitioner, however, fails to point to any "additional facts" that might have been necessary to complete

---

within the district judge's discretion," the court stressed that it "would be surprised * * * if these proceedings were to involve anything more elaborate than the prosecutor's articulation of his reasons, followed by the argument of defense counsel pointing out why the articulated reasons are factually unfounded or legally insufficient."

the record in this case. During the voir dire, each juror, white and black, gave information in open court about his or her education and employment. Accordingly, the trial court could assess the validity of the prosecutor's reasons for striking the black jurors by comparing the background of the black jurors that the prosecutor struck with the background of the white jurors that the prosecutor either struck or failed to challenge. Petitioner's objection to the adequacy of the record below merely collapses into his per se objection to the ex parte nature of the proceedings and does not depend upon any actual inadequacies in that record.[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

EDWARD S.G. DENNIS, JR.
Acting Assistant Attorney General

GEOFFREY BRIGHAM
Attorney

OCTOBER 1988

---

[5] This Court has granted certiorari in *Tompkins* v. *Texas*, cert. granted, No. 86-6405 (May 16, 1988), to determine, inter alia, whether an appellate court may defer to the district court's acceptance of the prosecutor's explanations even though the court of appeals found the explanations to be implausible on their face. The petitioner in *Tompkins* has argued (87-6405 Pet. 20) that the Texas Court of Criminal Appeals improperly failed to apply the clearly erroneous standard that ordinarily applies to findings of fact. Petitioner in this case acknowledges (Pet. 37 n.8) that the court below applied the clearly erroneous standard. Thus, it is unnecessary to hold this petition pending resolution of *Tompkins* v. *Texas*.

☆ U.S. GOVERNMENT PRINTING OFFICE: 1988—202-037/60684

Supreme Court, U.S.
FILED
APR 17 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-206

In The
Supreme Court of the United States
October Term, 1988

ROBERT L. TUCKER,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

On Petition for Writ of Certiorari to
the United States Court of Appeals
for the Seventh Circuit

PETITIONER'S REPLY BRIEF

JOHN A. POWELL
STEVEN R. SHAPIRO
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
132 West 43rd Street
New York, New York 10036
212/944-9800

JAMES B. HADDAD
NORTHWESTERN UNIVERSITY
SCHOOL OF LAW
357 East Chicago Avenue
Chicago, Illinois 60611
312/908-8325

Of Counsel

HARVEY GROSSMAN *
ALAN K. CHEN
The Roger Baldwin
Foundation of
ACLU, Inc.
20 East Jackson Boulevard
Suite 1600
Chicago, Illinois 60604
312/427-7330

Counsel for Petitioner
** Counsel of Record*

American Reprographics Management, Inc.™ (312) 332-ARMI (800-999-6239)

TABLE OF CONTENTS

	Page
Table of Authorities.....	i
Reasons for Granting the Writ.....	1
Conclusion.....	17

TABLE OF AUTHORITIES

Cases	Page
Batson v. Kentucky, 476 U.S. 79 (1986).....passim	
Franks v. Delaware, 438 U.S. 154 (1978).....6, 12	
In re: Robert Lee Tucker, No. M.R. 4706 (Ill. Sup. Ct. Mar. 29, 1989).....	3
United States v. Alcantar, 832 F.2d 1175 (9th Cir. 1988).....	2
United States v. Davis, 809 F.2d 1194 (6th Cir.), cert. denied, ___ U.S. ___, 107 S.Ct. 3234-35 (1987).....	5
United States v. Garrison, 849 F.2d 103 (4th Cir.), cert. denied, ___ U.S. ___, 109 S.Ct. 566 (1988).....	2, 5
United States v. Thompson, 827 F.2d 1254 (9th Cir. 1987).....	2, 4

United States v. Tindle, 860 F.2d 125, 131 (4th Cir. 1988), petition for cert. filed, No. 88-1379 (Feb. 17, 1989).....2, 5, 10

No. 88-206

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

ROBERT L. TUCKER, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITIONER'S REPLY MEMORANDUM

REASONS FOR GRANTING THE WRIT

For the following reasons, the necessity of Supreme Court review of this case is clear.

1. While the government argues that the use of ex parte proceedings

after Batson will not be widespread and that present review of this issue would be premature, (Opp.Cert. 9 n.3), the number of circuit courts already required to deal with this issue demonstrates sufficient need to warrant this Court's guidance on a fundamental and important issue of equal justice. The issue has arisen again in the Ninth and Fourth Circuits since the Thompson and Garrison decisions. United States v. Alcantar, 832 F.2d 1175 (9th Cir. 1988); United States v. Tindle, 860 F.2d 125 (4th Cir. 1988). Moreover, since Petitioner filed his cert. petition, two other parties have sought this Court's review of this basic question regarding the proper implementation of Batson. Tindle, supra, petition for cert. filed, No. 88-1379 (Feb. 17, 1989); Garrison, supra,

petition for cert. filed, No. 88-5824, (Nov. 4, 1988), cert. denied, ___ U.S. ___, 109 S.Ct. 566 (1988).[1]

2. The government's attempt to cast the conflicting decisions of the courts of appeals in a harmonizing light is unavailing. What the government portrays as simple "differences in emphasis" among the courts of appeal (Opp.Cert. 9), are in reality sharply conflicting rules.

On one side of the issue sit the Ninth and Fourth Circuits, which have

---

[1] Of course, Petitioner himself has a compelling interest remaining that this Court should not ignore. Following his conviction, Petitioner surrendered his license to practice law, but he was recently reinstated to the Illinois bar. See In re: Robert Lee Tucker, No. M.R. 4706 (Ill.Sup.Ct. Mar. 29, 1989). Thus, the only stigma remaining on his otherwise exemplary record is this conviction.

established a right of participation for defendants such as Petitioner who have already demonstrated a prima facie Batson violation. These courts have held that such a defendant is constitutionally entitled to an opportunity to hear and respond to the government's purportedly race neutral reasons for striking black venirepersons, unless the government demonstrates a compelling interest to the contrary.[2] United States v. Thompson, 827 F.2d 1254, 1258-59 (9th Cir. 1987);

---

[2] Contrary to the government's charge (Opp.Cert. 7), Petitioner obviously does not seek a "per se" rule of an adversarial hearing in every case. The scope of any hearing may be determined by the needs of the particular case. But, in the absence of a compelling reason, defendants who have established a prima facie Batson case minimally should be afforded the basic elements of due process, an opportunity to hear the government's reasons and to respond. That was not done in this case.

United States v. Garrison, 849 F.2d 103, 106 (4th Cir. 1988), cert. denied, ___ U.S. ___, 109 S.Ct. 566 (1988); see also United States v. Tindle, 860 F.2d 125, 131 (4th Cir. 1988), petition for cert. filed, No. 88-1379 (Feb. 17, 1989).

To the contrary are the Sixth Circuit, United States v. Davis, 809 F.2d 1194, 1202 (6th Cir.) (defendant's participation not always inappropriate), cert. denied, ___ U.S. ___, 107 S.Ct. 3234-35 (1987), and the Seventh Circuit in this case, which have held that a defendant so poised is entitled to no adversarial process. Without providing any meaningful or reviewable instruction to guide the lower courts, these decisions simply permit a trial court, in its discretion, to allow defendants to participate in unspecified circumstances.

(Pet. B11-B12).[3]

A constitutional requirement of adversarial pre-trial proceedings is certainly not without precedent. In order to properly enforce the Fourth Amendment, this Court in Franks v. Delaware, 438 U.S. 154, 155-56 (1978), required trial courts to hold adversarial evidentiary hearings after a defendant made a "substantial preliminary showing" that the affiant for a search warrant had recklessly or intentionally falsified statements underlying probable cause. Certainly no less can be required where, as here, the defendant has established a

---

[3] What circumstances those would be are difficult to imagine, given the Seventh Circuit's observation in Petitioner's case that the prosecution could have disclosed its reasons for excluding all the black venire members in open court without compromising any government interest. (Pet. B12).

prima facie claim of intentional race discrimination.

3. In an attempt to minimize the extent of the harm to Robert Tucker, the government wrongly asserts that nothing more could have been accomplished by Petitioner's participation in the ex parte Batson hearing and that the record of that proceeding is complete and left "no doubt that the prosecutor's motives were proper." (Opp.Cert. 7, 11). In fact, Petitioner's presence at the Batson inquiry would have contributed to the process in three significant ways.

First, such participation would have permitted Petitioner to point out to the district court that sufficient facts had not been developed upon which the court could adequately evaluate the legitimacy

of the government's explanations.

The trial court could not "assess the validity of the prosecutor's reasons" by comparing the actual extent of the education and business experience of the blacks whom the government struck with the qualifications of the all-white jury members who served without government objection, (Opp.Cert. 11), because those backgrounds were never fully developed.[4]

---

[4] The government's assertion that the profile of the selected jurors "validates" the government's ex parte explanation of its reasons for striking black jurors is suspect. (Opp.Cert. 7 n.2). A close examination of the voir dire transcript reveals that the government's characterization of these jurors' qualifications requires more than a liberal reading of the record. In a somewhat confusing statement, the government asserts that four of the selected white jurors had "college or post-graduate degrees" (Opp.Cert. 7 n.2)(emphasis added). In fact, there were four jurors with a college education, but none held anything more than a bachelor's degree. (V.D. Tr. 18-

The government's assertion that each potential juror offered information about his or her education and employment (Opp.Cert. 11), is simply untrue and not supported by the record. The voir dire at Petitioner's trial was sketchy and

---

22). The four who had completed high school and had, according to the government, "substantial or responsible employment," include a garden shop manager at K-Mart (V.D. Tr. 35), a truck driver (V.D. 50), a retired fast-food store manager (V.D. Tr. 32-33) and a payroll clerk (V.D. Tr. 52). Finally, the government's most extreme assertion is that one alternate juror's lack of a high school education was compensated for by her "secretarial skills and work experience." (Opp.Cert. 7 n.2). In fact, this white juror, in her own words had only "some secretarial background work skills" and had "worked for 3M Company as a packer in a factory". (V.D. Tr. 54). Her selection was surely inconsistent with the prosecution's desire to pick jurors educated "beyond high school" and "experienced in business." (V.D. Tr. 80). Due to illness of another juror, this alternate sat on the jury that convicted Petitioner. (Tr. 697).

unprobing. (V.D. Tr. 2-64). Many venirepersons gave incomplete responses to the court's open-ended inquiry about their backgrounds and several omitted either their educational level or the type of work experience they had. (V.D. Tr. 14-15, 34-35, 35-36, 57).[5]

For instance, the government's

---

[5] Moreover, despite its purported concern about selecting a highly-educated jury with substantial business experience, the government failed to request the court to inquire further, whether the incomplete responses were given by white or black venire members. Indeed, the appropriate way to protect the prosecution's purported concerns about education and business experience would have been to request further voir dire. See United States v. Tindle, 860 F.2d 125, 134 n.1 (4th Cir. 1988) (Murnaghan, J., dissenting). Thus, in fulfillment of Batson's mandate to make "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available," 476 U.S. at 93, the prosecution's failure to pursue this information about the black venirepersons is relevant, but unmentioned by the courts below.

assertion that only one of the blacks stricken from the venire had graduated from high school is misleading and not entirely determinable from the information elicited during voir dire. (Opp.Cert. 3). In addition to Perry White, a high school graduate (V.D. Tr. 21-22), David Bennett had a high school equivalency. (V.D. Tr. 54-55). Emma Jackson stated that "I went to Wells High School," without elaborating, or being asked to elaborate, whether she had graduated. (V.D. Tr. 34-35). Nor did the record adequately clarify the extent of David Bennett's 25 years of experience in "scrap metal recycling." (V.D. Tr. 54-55). From the scant record that was developed, it is equally plausible that Bennett was operating a lucrative and complex commercial recycling business as

it is that he was collecting discarded aluminum cans on the streets.

As this Court has observed, "[t]he usual reliance of our legal system on adversary proceedings itself should be an indication that an ex parte inquiry is likely to be less vigorous. Franks v. Delaware, 438 U.S. 154, 169 (1978). By conducting an ex parte examination of the prosecutors' motivations and refusing Petitioner the chance even to hear the government's explanations, the trial court prevented Petitioner from being able to respond at the most appropriate time--while the venire members were still present in the courtroom. (V.D. Tr. 71). Had Petitioner been afforded this basic opportunity at trial, he could have responded in a meaningful manner. (Pet. 10-14).

A second interest Petitioner's participation would have advanced is the protection of potential black jurors. Batson protects not only the rights of defendants, but also the rights of black jurors not to be discriminated against. 476 U.S. at 87. Thus, it was not simply what the trial court knew (that the prosecutors knew) that is relevant to the Batson claim here. That court had an independent duty to protect the black venire members' rights by making an "assessment of individual qualifications," id., to ensure that the blacks actually lacked that which the government believed was necessary to be a juror.

Finally, Petitioner's presence could have ensured that the reviewing courts had a sufficient record by adequately

developing the factual basis for the prosecution's peremptory challenges. For example, there is no way to determine from the record which white venirepersons were struck by the government (see infra). Accordingly, there is no way that an appellate court can review the validity of the government's contention that it struck all venirepersons for the same reasons. (V.D. Tr. 80).

4. The government also is wrong when it asserts that whatever the deficiencies at trial, the §2255 procedures cured the problem and that there was no other evidence that

Petitioner could have offered or developed.[6]

The procedures undertaken by the district court on the §2255 petition were insufficient to ensure that Petitioner's rights were not violated. In his request for relief, Petitioner asked for an order setting aside his conviction and sentence or, in the alternative, for some sort of hearing to resolve whether the prosecution had adequately met its burden under Batson. (R. 280, R. 286). The

---

[6] The government points to this supposed absence of "additional facts" both in support of its contention that Petitioner has already received sufficient adversarial process, and its assertion that Petitioner has had an adequate opportunity to develop a record that can be reviewed under the clearly erroneous standard (Opp.Cert. 9-11). Because such additional facts are clearly available, the government's response fails on both points.

district court, however, denied relief without oral argument or hearing. (Pet. C1-C3).

Thus, Tucker had to argue his §2255 petition with only an incomplete factual record, a venire that had long since departed and a transcript of an ex parte proceeding in which he was denied participation. From this Petitioner could, at best, articulate objections to the prosecutor's race neutral excuses for removing all blacks from the venire and point out, in the abstract, why these reasons might be deficient or constitute a pretext for discriminatory intent. However, if this showing did nothing more, it at least established his entitlement to the actual hearing he was requesting.

Had he been provided a hearing, even

on his §2255 petition, Tucker was likely to demonstrate that the prosecution's race neutral explanations were either pretextual or otherwise unfounded.

For example, given a §2255 hearing, Petitioner might have been able to subpoena the white venirepersons to identify those who were excluded by the government. From this, the court could have determined whether government peremptory strikes of those venire members were exercised consistent with the prosecution's explanation that it struck only jurors who were not educated "beyond high school," and who were "not sophisticated in terms of dealing with business." (V.D. Tr. 80).

CONCLUSION

Unless the Court assures that the Batson inquiry affords defendants the

basic opportunity to hear and respond to the prosecution's rebuttal to a prima facie discrimination claim, the promise of Batson will be illusory. Petitioner's case illustrates this all too clearly. Though the Court of Appeals held there was no reason to depart from regular adversarial process, the trial court did so, and consequently could not adequately determine whether a circumstantial case of discrimination existed. Unchallenged, the prosecution was permitted to present only generalized and vague reasons for striking black venirepersons and no additional voir dire questions that might substantiate those reasons were requested. Even with the limited facts available, however, it was clear that some blacks had education and business experience equivalent to that of whites

who were seated on the jury. On the present state of the record, no meaningful appellate review of the trial court's determination is possible.

For these reasons, as well as those set forth in the petition, the Court should issue a writ of certiorari to review the judgment and decision of the Seventh Circuit in Petitioner's case.

Respectfully submitted,

Harvey Grossman*
Alan K. Chen
The Roger Baldwin
Foundation
of ACLU, Inc.
20 East Jackson Boulevard
Suite 1600
Chicago, Illinois 60604
(312) 427-7330

Counsel for Petitioner

*Counsel of Record

April 17, 1989